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I
Introduction

The first amendment, drafted in an era of print, has assumed a new importance with the emergence of telecommunications and other non-print media. A third wave of communications technology, succeeding print, traditional broadcasting and telephony, and involving the interface between the computer and traditional forms of telecommunications, promises to raise many new first amendment questions.

This article addresses some of these questions in the context of what many regard to be a newly-emerging mass medium of home and office information-retrieval. Information stored in centralized data banks is now accessible by home computer over telephone and cable networks, over a combination of these networks, and through over-the-air broadcasting. The proprietors of these data banks may be said to "publish" their information—however ephemerally—each time an end-user retrieves information from their data bases. If taken seriously, this concept of "electronic publication" raises important first amendment questions.

After a brief introduction to the nature of the new medium, this article discusses some of the first amendment issues in-

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volved in access to stored information bases and the "mirror image" problem of controlling such stored information. Because many of the potential first amendment issues involved are attributable to the nature of the medium itself, the development of distributed information networks is described. The article summarizes possible regulation of the new medium under the Communications Act of 1934 and concludes by suggesting a first amendment policy for electronic "publication."

II
The Nature of "Electronic Publishing"

"Electronic publishing" makes information available by reproducing pages of text and other images on a video display terminal or television screen. Information is usually broadcast over the air, or transmitted through coaxial cables[1] or telephone wires, and is decoded or processed by a small home or office computer connected to the display screen.

Some systems provide only a one-way or "downstream" flow of information: signals are transmitted from the source or "head-end" computer to the end-user, but not vice versa. These one-way networks, called "teletext" systems, merely allow transmission of a limited number of pages in a continuous cycle, but the end-user may freeze or "grab" a page of particular interest and peruse it at leisure. Because information transmitted by teletext is unreeled in a scroll-like, sequential fashion, the end-user must wait until the page in which he is interested appears before "grabbing" it for use. However, indexing systems with individually-numbered frames allow him simply to input the number of a frame in order to have it held for him when it appears in the transmission cycle.

More interactive systems provide two-way communication between the end-user and the data source. The "head-end" or data storage computer holds a large body of retrievable information which can be recalled by the end-user at will. Individual pages may be recalled on signal without waiting for them to appear on the screen, as is necessary in teletext systems. Some systems currently in use—such as the LEXIS legal research service—are highly interactive, and the end-user may

1. "Coaxial cables" are insulated cables used to transmit telephone, telegraph and television signals of high frequency. A. SMITH, GOODBYE GUTENBERG: THE NEWSPAPER REVOLUTION OF THE 1980'S, 334 (1980).

tailor a search of the computer's data base to suit individual needs and to refine the search as it proceeds.[2] The generic term for this more interactive two-way system is "videotex."

Recent technological developments have strained traditional government regulation in this area, and this strain in turn has created a dilemma. Traditional print publishers may have conflicting interests as these systems "come on stream." Print publishers have successfully defended their rights to print and publish whatever they chose,[3] and today remain exempt from the access requirements imposed on broadcasters and common carriers.[4] However, they now find themselves in a difficult situation. On the one hand, print publishers may demand, for reasons of economic self-interest, that owners and operators of cable systems, space satellite transponders[5] and other media carry their messages over regulated channels. On the other hand, those traditional print publishers who are, or will become, proprietors of electronic media may feel uncomfortable with such access requirements. Choosing what to publish, and how and when to publish it have traditionally been among a publisher's most cherished prerogatives.[6]

This dilemma is compounded by the fact that government regulation in this area lags behind the evolution of the electronic media in question. A half-century old distinction between "broadcasting"[7] and "common carriage"[8] continues as

2. *See* A. SMITH, *supra* note 1, 241-317; INSTITUTE FOR THE FUTURE/NATIONAL SCIENCE FOUNDATION, TELETEXT AND VIDEOTEX IN THE UNITED STATES; *Data Services Map the Way in Labyrinths of Information*, N.Y. Times, Aug. 23, 1981, § IV, at 9, col. 1; *Viewdata*, special supplement to Financial Times (London), § III, Dec. 1, 1981; *The Looming Battle Over Videotext*, DUN'S REVIEW, Feb. 1981, at 58-61.

3. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

4. 47 U.S.C. § 153(h) (1976).

5. "Communications satellites have been distributing video programming in the United States since 1975." N.Y. Times, June 9, 1975, at 25, col. 7. "They have made possible the economic viability of special interest networks, such as those devoted to religion, minorities, sports, motion pictures, and cultural programming . . . ." Comment, *Direct Broadcast Satellites: Ownership and Access to the New Technology*, 33 FED. COM. L.J. 245 n.1 (1981).

6. For the development and culture of publishing as an industry see L. COSER, C. KADUSHIN & W. POWELL, BOOKS: THE CULTURE AND COMMERCE OF PUBLISHING (1982).

7. A "broadcaster" is one who disseminates "radio communications intended to be received by the public. . . ." 47 U.S.C. § 153(o) (1976). "Broadcasting" is regulated under Title III of the Communications Act, 47 U.S.C. §§ 301-399 (1976).

8. A "common carrier" holds himself out indifferently as offering communications services and facilities for the transmission of intelligence of the customer's own design and choosing. National Association of Regulatory Util. Comm'rs v. FCC, 533 F.2d 601 (D.C. Cir. 1976). Common carriage, which includes not only the conventional tele-

the basis for such regulation despite the fact that much of the new technology does not fit comfortably into either category. Furthermore, the important question of whether the "electronic publication" of information is to be described as "data processing"[9] or as "communication,"[10] remains open, although the former may not be subject to current government regulation while the latter most certainly is.[11]

Perhaps most important are the social and economic changes which will flow from what may accurately be described as a change in the "topography" of information-processing and exchange. This change, from a centralized system of broadcasting and monopolistic common carriage to a decentralized, vigorously competitive and differentiated communications marketplace, may be the most important result of the current upheaval in the structure of our national information systems.

III
Controlling the Data Base and Gaining Access to the Network: Regulation of the Editorial Function in Electronic Publication

Perhaps the most important first amendment distinction be-

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phone and telegraph industries, but also radio common carriers and various microwave and satellite carriers, is regulated under Title II of the Communications Act. *See* 47 U.S.C. §§ 201-24 (1976).

9. In its initial attempt to grapple with the problem of distinguishing "communication" from "data processing," the FCC left unregulated "operations which include the functions of storing, retrieving, sorting, merging and calculating data according to programmed instructions." Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities—Final Decision and Order [hereinafter cited as First Computer Inquiry—Final Decision], 28 F.C.C.2d 261, 265, 21 Rad. Reg. 2d (P&F) 1591, 1592 n.3 (1971), *aff'd in part sub nom.* GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 F.C.C.2d 293, 26 Rad. Reg. 2d (P&F) 1727 (1973).

The FCC originally held that operations in which computers were used in a message-switching capacity—to control the "transmission of messages, between two or more points, via communications facilities wherein the content of the message remains unaltered," would be subject to government regulation. This language was codified in 47 C.F.R. § 64.702(a)(2) (1974). However, this distinction has been abandoned in favor of one dividing the domain into "basic" and "enhanced" services. *See infra* note 91. *See generally* Comment, *The Computer Inquiries: Mapping the Communications/Information Processing Terrain*, 33 FED. COM. L.J. 55, 62-66 (1981).

10. *See supra* note 9.

11. Comment, *supra* note 9.

tween electronic and print media involves control over the editorial function. Common carriers, for example, have almost no editorial control over contents and must transmit the messages of all of their customers untouched.[12]

Traditional over-the-air broadcasters and proprietors of cable systems, on the other hand, are subject to a variety of such controls. The former are subject to a variety of federal regulations,[13] the latter to an increasingly prevalent incidence of local controls exacted in the franchising process.[14]

Traditional government regulation of broadcasting has been predicated on an alleged "scarcity" of usable channels along the electromagnetic spectrum and by the notion that this spectrum is a "valuable public resource."[15] Under this rationale, the licensed broadcaster "is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations."[16]

In *Red Lion Broadcasting Co. v. FCC*,[17] the United States Supreme Court pointed out that "[a] license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the government from requiring a licensee to share his frequency with others."[18] The *Red Lion* decision had upheld the constitutionality of the FCC's "fairness" and "personal attack"[19] rules, relying largely on the

12. *See supra* note 8 and accompanying text.

13. For a summary of federal regulation of over-the-air broadcasting, see R. WILEY, PRACTISING LAW INSTITUTE, THE MEDIA AND THE COMMUNICATIONS REVOLUTION: AN OVERVIEW OF THE REGULATORY FRAMEWORK AND DEVELOPING TRENDS, NINTH ANNUAL COMMUNICATIONS LAW INSTITUTE 480-07 (1981).

14. *See, e.g., R-Rated TV Leads to Attacks on "Cableporn,"* L.A. Times, May 17, 1982, at 1, col. 5. Denver and Houston, for example, have excluded X-rated, but not R-rated, programs from the franchises they have awarded for local cable service.

15. Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 123 U.S. App. D.C. 328 (1966).

16. *Id.* at 1003.

17. 395 U.S. 367 (1969).

18. 395 U.S. at 389.

19. Broadcasters are required to present programming on controversial issues of public importance, and when they do so, to present contrasting viewpoints if one side of a controversial issue has been broadcast. 47 U.S.C. § 315(a) (1976). *See also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Fairness Report, 48 F.C.C.2d 1 (1974). In addition, a person or group whose honesty or integrity is attacked on a broadcast station generally has a right to reply to the attack. *See* 47 C.F.R. § 73 (1981).

"scarcity" rationale.[20] While similar "scarcity" arguments may be raised in the context of electronic publishing, they could only be based on a misconception of the nature of contemporary information networks.[21]

To be sure, early information-processing more closely resembled network television broadcasting than telephone common carriage. Computers before 1965 were huge, expensive and often unreliable. Programming languages were difficult and esoteric, and access to the machines was possible only through on-site input and output devices. "Consequently, a user was compelled to mail or otherwise physically deliver data to the computer's location and carry the processed data back to the site of his business."[22] Furthermore, these early computers were often capable of processing only one job at a time, no matter how little of the computer's core capacity the job required. As a result, early computer networks were highly centralized. A large central computer, called a "mainframe," was the center of operations and could only receive data physically carried to it from outlying users. While this system differed from network broadcasting in the sense that information was brought *to* the center to be processed rather than being originated *at* the center and generated to the periphery, it shared with network broadcasting its centralized character. In this context, a scarcity argument might have been appropriate.

In the past fifteen years the characteristics of information-processing networks have changed. Rapid technological development during this period has fundamentally changed the relationship between the computer and its users. One major breakthrough was the development of input and output devices, called "terminals," which a computer user could install at the site of his business and use to transmit and receive data directly to and from a computer at a remote location. "Because computers and communications facilities operate electronically, they formed a beautifully-meshed transmission system that eliminates the burden and costs of having human labor code messages for electronic transmission at one end and decode them after reception at the other."[23]

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20. *See supra* text accompanying note 15.

21. 395 U.S. 367, 400 (1969).

22. *See, e.g.*, Note, *The FCC Computer Inquiry: Interfaces of Competitive and Regulated Markets*, 71 MICH. L. REV. 172, 173-76 (1972) and the sources cited therein.

23. *Id. See also* S. NORA & A. MINC, THE COMPUTERIZATION OF SOCIETY, (1980). The

While remote terminals made the computer accessible wherever a telephone or telegraph line was available, a serious constraint on processing still remained. The main advantage of remote terminal hookups—speed in gaining access to the computer—was vitiated by the fact that a user attempting to gain access to a central computer by such remote terminals frequently encountered hours of "busy signals" while waiting for others to complete their work. Consequently, it was often cheaper and more efficient to continue to send data from remote offices to the computer by mail or some other manual means, rather than to have expensive terminal equipment standing idle.[24] Another major breakthrough, time-sharing technology, significantly altered this situation. Computer scientists developed new hardware and software that enabled newer computers to process several jobs at once.

The ability of newer computers to receive inputs simultaneously from many remote terminals made clear the importance of the telephone and telegraph links which tied outlying terminals to the central computer. While such networks could still be most accurately described as "starshaped," the centralized character of the information-processing network, and any potential scarcity argument to which such a system might have given rise, had begun to change forever. The introduction of the microcomputer and the advent of commercial time-sharing began to speed a change in the shape of the network from a system resembling a "star" to one resembling an interconnected "web."[25]

When the "home computer"[26] was born it created the possibility of fully distributed information-processing networks and the potential marketplace for "electronic publishing."[27] For the price of an expensive stereo set, an individual or small business can now afford an information-processing system which would have been the envy of a large business enterprise a decade ago. One example of the direction future develop-

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Nora-Minc volume, at 15-29, is a translation of L'INFORMATISATION DE LA SOCIETE (1978), a report prepared for the French Government. Three documentary volumes supplementing this work will be published by Editions Seiul (La Documentation Francaise); for a summary of these volumes see *id.* 144-48.

24. *See supra* note 23.

25. *Id.*

26. *See, e.g.*, R. PERRY, OWNING YOUR HOME COMPUTER (1980).

27. *See id.* at 13-241; C. EVANS, THE MICRO MILLENNIUM 108-45 (1979); Scholl, *Videotex Revolution*, BARRON'S, Aug. 2, 1982, at 1, col. 1.

ments may take, the integrated video terminal (ITV), which combines a television display screen, a video cassette recorder, a printer, a telephone modem or connecting device, and a home computer, has now become available.[28]

This combination of advancing technology and fierce commercial competition has changed the shape of the information-processing world. No longer do information processing systems consist merely of a central computer which is the site of all data processing, and for whose use each patron must patiently wait his turn. Home computers make possible increasingly complex information-management in the home or office thereby decentralizing the control of that information. At the same time, information can now be shunted around by telephone, telegraph or over other media so that it can be more easily bought and sold like other commodities.[29] The national information network now begins to resemble a loosely knit web of information-processing systems. And this development, while obviating any arguments over scarcity, creates new problems of access and control over the "publication" of electronically-stored information.

As the fixed cost of information-processing[30] goes down, information providers' "goods" will become relatively more valuable.[31] Traditional print publishers seem to be well-positioned to take advantage of this historic development. In order to do so, however, those electronic publishers who do not have conflicting interests by virtue of being the proprietors of cable networks or satellite transponders may wish to argue for a *Tornillo*-like standard[32] with regard to the control of content in their data bases. In *Miami Herald Publishing Co. v. Tornillo*,[33] a unanimous United States Supreme Court found that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."[34] The Court firmly rejected the proposition that government regulation of these processes could "be exercised

28. Financial Times (London), Dec. 1, 1981, at 17 (advertisement).
29. *See, e.g.*, C. EVANS, *supra* note 27, at 112-21; S. NORA & A. MINC, *supra* note 23.
30. *E.g.*, the costs of hardware, software and computer time.
31. S. NORA & A. MINC, *supra* note 23, at 30-82.
32. *See infra* notes 33-36 and accompanying text.
33. 418 U.S. 241 (1974).
34. *Id.* at 258.

consistent with the First Amendment guarantees of a free press as they have evolved to this time."[35] But, as we shall see in a moment, the answer may not be so simple if the context is one of electronic publication rather than one of print.

If electronic publishers win first amendment protection for the integrity of their data-bases, for their right to be editors as well as publishers, they must still insure that they will be able to distribute that information to end-users.

With that goal in mind, electronic publishers may wish to argue for common carriage rights of access to whatever networks are available for information distribution.[36] Such access, of course, is already available over current common carriers, but not over cable, or over the broadcast medium of the vertical blanking interval.[37]

However, the courts have never found a general right of public access either to the broadcast media or to cable operations. In *CBS, Inc. v. Democratic National Committee*,[38] the United States Supreme Court rejected the notion that the first amendment requires broadcasters to sell time to private persons who wish to broadcast their political views.[39] Similarly, in *FCC v. Midwest Video Corp.*,[40] the Court struck down FCC rules which required proprietors of cable systems to provide access to members of the general public on the ground that these rules exceeded the FCC's authority.[41] It is unclear, therefore, how the courts will treat claims of right to access over media other than common carriage as electronic publication comes on stream. It seems highly likely, however, that this will be a conflict-ridden area.

IV
Regulation of Electronic Publishing Under the Communications Act of 1934

Because electronic publishing makes use of electronic media of distribution, it may be subject to the Communications Act of 1934, the FCC regulations which interpret the Act, and any suc-

35. *Id.*
36. *See supra* note 8 and accompanying text.
37. Neustadt, Skall & Hammer, *infra* note 58.
38. 412 U.S. 94 (1973).
39. *Id.* at 101-104; 121-170.
40. 440 U.S. 689 (1979).
41. *Id.* at 708.

cessor acts, such as one currently under consideration in the Congress.[42] Under the rationale that the electronic media are either "natural monopolies,"[43] such as telephone and telegraph systems, or make use of a "valuable and scarce public resource,"[44] such as the broadcast spectrum, courts have consistently upheld the Communications Act against first amendment challenges.[45] For example, the United States Supreme Court has upheld licensing and market entry regulations for broadcasters as regulation in the public interest.[46] These regulations require broadcasters to "ascertain community needs,"[47] to provide programming on controversial public issues and to present contrasting viewpoints if one side of a controversial issue is broadcast.[48] In addition, the Supreme Court has upheld restrictions on the ownership of broadcast stations and has held over-the-air broadcasters to a stricter obscenity-indecency standard than print publishers,[49] citing the pervasiveness of the broadcast medium and its intrusion into the home.[50]

Insofar as it is labelled "broadcasting," over-the-air teletext may well be subject to many of these controls. The FCC, however, has tentatively decided that teletext will not be subject to the "fairness"[51] and "equal time" rules.[52]

A. Electronic Publication via Cable

The rules governing cable TV are in a state of flux. The FCC's broad claim to regulatory authority over cable by virtue

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42. S. 898, 97th Cong., 2nd Sess. §§ 101-409 (1981).

43. This traditional doctrine has given way under the impact of new technologies which provide alternative sources of common carriage. *See, e.g.*, Allocation of Microwave Frequencies Above 890 Mc, 27 F.C.C. 359 (1959); Specialized Common Carrier Decision, 29 F.C.C.2d 870 (1971), *aff'd sub. nom.* Washington Util. & Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied*, Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 423 U.S. 836 (1975).

44. *See supra* text accompanying note 15.

45. *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190 (1943); CBS, Inc. v. Democratic National Committee, 412 U.S. 94 (1973).

46. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) (upholding 47 U.S.C. § 309 (1976)).

47. *See, e.g.*, WGN of Colorado, Inc., 31 F.C.C.2d 413 (1931).

48. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding 47 U.S.C. § 315(a) (1976)); *see also* Fairness Report, 48 F.C.C.2d 1 (1974).

49. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

50. *Id.* at 727.

51. *See supra* note 19.

52. *F.C.C. May Exclude the Electronic Press from Fairness Rules*, N.Y. Times, Dec. 4, 1981, at A24, col. 1.

of cable's "ancillary" status to over-the-air broadcasting[53] has been significantly eroded by recent court decisions.[54] In *FCC v. Midwest Video Corp.*,[55] for example, the United States Supreme Court invalidated the FCC's mandatory access rules which had required cable systems to make channels available on a first-come, non-discriminatory basis and free from editorial control.[56] These rules, the Court found, imposed "common carrier" obligations on cable operators and thus exceeded the FCC's "ancillary" authority to regulate cable television.[57] The FCC's authority to preempt local and state regulation of cable operators, however, remains unsettled.[58] However, the FCC still imposes content regulations and a few economic rules on cable operators, some states regulate cable, and most local jurisdictions impose extensive rate and structural controls through the franchising process.

B. State and Local Regulation of Electronic Publication over Cable: The Preemption Problem

As the FCC begins to withdraw from the regulation of cable TV, state and local content and access controls are likely to become more important. Not only have some jurisdictions already imposed content rules in their franchising requirements,[59] but many demand mandatory access channels as well.[60] In addition, electronic "publication" over cable may be affected by local laws on obscenity, defamation and privacy.[61]

Local and state abridgement of the electronic publisher's first amendment rights is likely to evolve as a serious problem

53. While the FCC has no direct jurisdiction over cable television, the Supreme Court has held that the FCC has such jurisdiction under the Communications Act as is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

54. Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

55. 440 U.S. 689 (1979).

56. *Id.* at 689, 699-702.

57. *Id. See generally*, Hanks and Coran, *Federal Preemption of State Obscenity Law Applied to Broadcasting*, 5 COMM/ENT L.J. 21 (1982).

58. For a discussion of this problem see Neustadt, Skall & Hammer, *The Regulation of Electronic Publishing*, 33 FED. COM. L.J. 331, 385-92 (1981).

59. *See supra* note 14.

60. New York City is an example. *See, e.g., Is Public Access TV Doing Its Job?* N.Y. Times, Aug. 22, 1982 § 2, at 1, col. 1.

61. *See, e.g.*, D. Nash & J. Smith, *infra* note 73.

to the extent that state and local cable regulation is not preempted by the FCC.[62] Concessions on content by cable operators have most often been made during the franchising process. Because this is the case, it may be difficult to find a successful cable franchisee who is willing to risk offending local authorities by bringing a first amendment claim. Furthermore, state and local support for such content restrictions is likely to have a "chilling effect"[63] on the "publication" of certain sorts of information over cable even in the absence of formal prohibitions, and any statutory prohibition on the publication of certain information over cable may constitute a "prior restraint,"[64] in violation of the first amendment.

FCC content regulation currently distinguishes between origination-cablecast-programming, over which the cable operator has "exclusive control," and programming transmitted over "access channels."[65] "Origination cablecasting" remains subject to a variety of content controls.[66] "Access channels," on the other hand, are now completely free of FCC content regulation.[67] As a result, to the extent that information provided by electronic publishers over cable is considered "program-

62. *See* Neustadt, Skall & Hammer, *supra* note 58, at 385-92.

63. The metaphor of the "chilling effect" refers to the judicially-expressed concern that constitutionally protected speech will be withheld because of the threat of criminal or civil sanctions. "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

64. Any restraint on expression *prior* to its publication while "not unconstitutional *per se*," Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975) (emphasis in original), is presumptively unconstitutional. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973). Any party seeking such a "prior restraint" must show that the expression to be prohibited "fit[s] within one of the narrowly defined exceptions to the prohibition against prior restraints, and . . . must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." 420 U.S. at 558-559. *See generally* ABRAMS, PRIOR RESTRAINTS, NINTH ANNUAL COMMUNICATIONS LAW INSTITUTE, PRACTISING LAW INSTITUTE 775-810 (1981). *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) for a thorough discussion.

65. The FCC distinguishes between "origination cable-casting"—programming over which the cable operator has "exclusive control"—and programming "controlled by others." 47 C.F.R. § 76.5(w) (1981).

66. Origination channels may not carry obscene or indecent matter, or advertising that lacks sponsorship identification. 47 C.F.R. §§ 76.215, 76.221 (1981). Nor may such channels carry lottery information on non-state run lotteries. 47 C.F.R. § 76.213 (1981). Origination channels are also subject to the equal opportunity requirements for political candidates, and are subject to the Fairness Doctrine. 47 C.F.R. §§ 76.205, 76.209 (1981).

67. 47 C.F.R. § 76.254, *deleted by* Order in Docket 20508, 83 F.C.C.2d 147 (1980).

ming," rather than some other form of communication or information-processing, these rules may have a significant effect.

However, technological developments have obscured the seemingly simple distinction between "origination cablecasting" and the mere provision of "access." Many cable systems now purchase programming from satellites and pass it through without alteration to subscribers on a "pay" or "fee" basis. Since the proprietor of the cable system has purchased the programming before sending it on to his subscribers, it may "belong" to him, and therefore be subject to content regulation under the "origination" doctrine. If, on the other hand, the cable operator has merely licensed his system for use by the satellite distributor, then the programming has "originated" with the distributor and is immune from content regulation. The importance of having this ambiguity resolved cannot be overstressed. Inasmuch as electronic publishing makes use of the cable system, the nature of the first amendment protection which it can claim will depend on whether its provision of information through the cable system is defined as "programming" and, if it is so defined, with whom such programming will be found to have "originated."

The FCC has tentatively decided that over-the-air teletext is an "ancillary" service, rather than "broadcasting," and is, therefore, not subject to the fairness and equal time rules imposed on radio and television.[68]

C. Electronic Publication Over the Multipoint Distribution System (MDS)

One form of over-the-air teletext may be exempt from federal content controls. The FCC has ruled that the Multipoint Distribution System (MDS), which operates on over-the-air frequencies which require special decoders, is a "common carrier."[69] MDS operators presently contract with program suppliers to deliver television to subscribing homes and apartments on channels that could easily be used to provide broadcast teletext.[70] The presently available spectrum for MDS

68. *See supra* note 52.

69. *See* 47 C.F.R. §§ 21.900-21.908 (1981).

70. MDS operators contract with program suppliers to deliver television programming to subscribing homes and apartments for a monthly fee. The program is carried on a scramble signal, on radio frequencies assigned by the FCC. Subscribers receive a signal decoder as part of their subscription fee.

is quite limited, however, and the FCC sharply restricts the number of licensees in each market.[71] Normally, the MDS licensee leases his entire channel to a company to provide programming. However, it is possible that the vertical blanking interval (VBI) portion of the channel over which MDS teletext is broadcast could be leased to one entity and the remainder of the channel to another.[72] Since most of the content rules applicable to over-the-air broadcasting and to cable do not apply to common carriage, teletext broadcasting over MDS channels will likely be exempt from those regulations.

D. Electronic Publication via Telephone

The telephone network is the only two-way communication network currently available to most people, although the spread of interactive cable systems may eventually provide an attractive alternative.[73] For the remainder of the decade, however, telephone networks will continue as the principal medium for videotex. Under the Communications Act,[74] the telephone company, as a monopoly, is subject to rate and other regulations, and must make its facilities available to the public at large.[75]

The only Federal content regulation currently affecting telephone-delivered videotex is a criminal prohibition on the use of the telephone to make "any comment, request, suggestion, or proposal which is lewd, lascivious, filthy, or indecent."[76] Although this provision has not been tested under the first amendment, it could hinder the use of telephone-delivered videotex in obvious ways. The key issue in this area, of course, is not so much how telephone videotex will be regulated, but whether AT&T will be permitted to become a provider of infor-

71. The FCC currently permits only two licensees per major market, but recent proposals would significantly increase the number of frequencies over which MDS could be distributed. *See* Notices of Inquiry and Proposed Rulemaking, 45 Fed. Reg. 29,350 (1980).

72. A variety of copyright and other issues could arise in this context. *See* WGN Continental Broadcasting Co. v. United Video, Inc., 523 F. Supp. 403 (N.D. Ill. 1981). *See also Broadcasters Lose in First Cable-Copyright Case*, Legal Times of Washington, Oct. 19, 1981, at 1, col. 2.

73. *See, e.g.*, D. NASH & J. SMITH, INTERACTIVE HOME MEDIA AND PRIVACY 33-53 (1981) (prepared for Office of Policy Planning, Federal Trade Commission); A. SMITH, *supra* note 1 at 274-78.

74. 47 U.S.C. § 154 (1976).

75. *Id.*

76. 47 U.S.C. § 233 (1976).

mation over the telephone system—that is to say, an electronic "publisher."[77]

V
Some Hypothetical Problems: Extrapolating from the Present

The first amendment difficulties which must be anticipated may be illustrated by several recent court decisions. For example, in *Official Airlines Guide Inc. v. FTC*,[78] the Reuben H. Donnelly Corporation, which publishes the *Official Airline Guide (OAG)* was charged by the Federal Trade Commission (FTC) with several antitrust violations, including unfairly refusing to publish connecting flight schedules of commuter airlines. An FTC administrative law judge (ALJ) ordered Donnelly Corporation to change the order in which it published certain information in the OAG, notwithstanding the publisher's first amendment objections.[79]

The case was subsequently reviewed by the full Commission. In this proceeding, the Donnelly Corporation cited *Tornillo* in arguing that the ALJ's order amounted to editorial supervision of the OAG and therefore violated the first amend-

77. [Editor's Note: this question has been largely resolved.]

United States v. American Telephone & Telegraph Co. was settled after the author had had an opportunity to make text revisions. *See* [July-Dec.], ANTITRUST & TRADE REG. REP. (BNA) No. 1077 (Aug. 12, 1982) (special supp.). The Justice Department and AT&T reached a settlement and submitted it to district court Judge Greene for approval. In his opinion of August 11, 1982, Judge Greene refused to approve the settlement unless the parties agreed to ten modifications.

One such modification would prohibit AT&T from engaging in electronic publishing over its own transmission facilities. However, the prohibition would expire in seven years. *Id.* at 317.

In part VI of his opinion, Judge Greene felt that anticompetitive considerations *alone* would justify barring AT&T from the electronic publishing industry. In addition, he recognized that AT&T's entry into the electronic publishing market would pose a "substantial danger" to first amendment values. He argued that the first amendment protects diversity in *sources* and in *dissemination* of information and that permitting AT&T to become an electronic publisher would not further these public interests. *Id.* at S-47-S-53 (special supp.).

The parties agreed to Judge Greene's terms, with little protest, on August 26, 1982. *Id.* at 380. AT&T may manufacture and market equipment for electronic publishers and may perform certain limited electronic publishing services such as product and homeowner directory services. *Id.* at S-47-S-53 (special supp.).

78. 630 F.2d 920 (2d Cir. 1980).

79. *In re* Reuben H. Donnelley Corp., 95 F.T.C. 1, 3 TRADE REG. REP. (CCH) ¶ 21,650 (1980).

ment.[80] Citing cases in the area of commercial speech, the FTC countered that the Supreme Court "[had] not raised commercial speech on [sic] the same level of protection as noncommercial speech,[81] [and that] the Court [had] reaffirmed the necessity of regulating false, deceptive or misleading speech."[82] While acknowledging that the OAG, though a directory rather than a newspaper, was entitled to full first amendment protection, the Commission nonetheless dismissed the publication's first amendment argument and ordered it to make the requested editorial changes.[83] The Commission further found that Donnelly Corporation's listing policy was misleading.[84] On appeal,[85] the Court of Appeals for the Second Circuit reversed the Commission's order on the ground that monopolistic publishers of airline schedules have no duty not to discriminate between certified air carriers and commuter lines.[86] The Court of Appeals, however, failed to address important first amendment issues regarding control of a printed data-base.[87]

While at first glance the Second Circuit's decision appears unrelated to the problems of electronic publication, consider how much more difficult the problem would have been had the information in the OAG been stored in a computer rather than in a bound guide, and been retrieved electronically over a common carrier, or received by broadcast teletext, rather than published in book form. Under such circumstances it is unclear to what level of first amendment protection the *Guide* would have been entitled. Conceivably, the answer would depend to some extent on the medium over which the information had been "published," with the greatest protection being afforded for publication over telephone, and the least for broadcast teletext, with publication over cable falling somewhere in be-

80. 95 F.T.C. at 85.

81. 95 F.T.C. at 45, 86 (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

82. 95 F.T.C. at 45 (citing Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)).

83. 95 F.T.C. at 84-86.

84. 95 F.T.C. at 84.

85. Donnelly filed a petition for review to the Second Circuit Court of Appeals pursuant to section 5(c) and (d) of the FTC Act, 15 U.S.C. § 45 (c)-(d), 630 F.2d 920, 923 (1980).

86. *Id.* at 920.

87. Official Airline Guides, Inc. v. Federal Trade Commission, 630 F.2d 920, 921 (2d Cir. 1980).

tween. It is unclear, furthermore, whether the first amendment protections available for printed commercial speech would have been available in such a case, and whether, if printed in hard-copy after having been initially retrieved electronically, the information would have benefited from the *Tornillo* standard.

Other, different problems are also likely to arise. The first amendment protects more than freedom of speech and of the press;[88] it guarantees freedom of religion and assembly as well.[89] A second example, concerning the *Christian Yellow Pages*,[90] demonstrates the problems that arise when different first amendment values come into conflict. How they will be resolved when electronic publishing comes fully "on-stream" is uncertain. The publishers of the *Christian Yellow Pages*, a business directory for "born-again" Christians, adopted a policy of excluding Jewish-owned businesses from the directory. The publishers asserted their first amendment rights of speech, of the press, and of association and religion, and claimed that the Consitution guaranteed them the right to publish a business directory which excluded non-believers. The Jewish merchants, on the other hand, regarded their exclusion from the directory as a form of religious discrimination.

Had the directory been distributed electronically, the rights asserted by the excluded merchants might very well have outweighed the first amendment rights of the publisher. In the more traditional print context, however, this certainly would not be the case.

These examples illustrate the tangled nature of the first amendment issues which electronic "publication" will confront absent a clarification of the access and data-base control issues. First amendment and regulatory doctrines which have evolved as responses to the rise of print, telephony and broadcasting are likely to be incomplete when faced with conflicts arising over the use and control of videotex and teletext.

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88. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. 1.

89. *Id.*

90. *See Accord Reached in Suit over Christians' Ads*, N.Y. Times, Nov. 1, 1981, at 30, col. 1.

VI
Conclusion

Electronic publication using over-the-air broadcast signals will likely be subject to the traditional rules governing radio and television broadcasting, with the exceptions of the fairness and equal time rules. However, those electronic publishers using the special wavelengths assigned for transmission over the multipoint distribution system (MDS) will probably have greater publishing freedom, since the MDS has been designated a "common carrier." MDS transmissions, however, may be subject to regulation under state and local defamation, obscenity and perhaps privacy statutes.

On the other hand, electronic publication over the telephone network may be considered merely an "enhanced" form of data processing under the FCC's *Second Computer Inquiry* decision,[91] rather than a medium of "broadcasting" or of "common carriage." If designated a form of data processing, electronic publication would not be subject to current FCC regulation. However, the FCC has explicitly reserved the right to regulate data processing in the future,[92] although its authority to do so is disputed.[93] State and local obscenity, defamation and privacy statutes will probably apply to electronic publication over the telephone network.

The status of electronic publication over coaxial cable is unclear. To the extent that cable teletext resembles broadcasting, it may be subject to the FCC's "ancillary" jurisdiction. However, interactive videotex transmitted over cable may be exempt from FCC regulations as neither "broadcasting," nor

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91. Docket No. 20828, Final Decision, 77 F.C.C.2d 384; Memorandum Opinion and Order, 84 F.C.C.2d 50 (1980). In the Second Computer Inquiry, the FCC discarded the First Computer Inquiry's distinction between "data" and "communications" and adopted a new line of demarcation between "basic services" and "enhanced services."

Basic services are defined as the "common carrier offering of transmission capacity for the movement of information between two or more points," 47 U.S.C. §§ 201-223 (1976).

Enhanced services which are not subject to regulation under Title II, are defined as:

> [S]ervices, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information . . . or involve subscriber interaction with stored information.

47 C.F.R. § 64.702(a) (1981).

92. *See supra* notes 9-11 and accompanying text.

93. *See supra* notes 9-11 and accompanying text.

"ancillary" to broadcasting.[94]

Current federal content rules governing cable television may also govern electronic publication over cable, depending on whether cable transmission is subject to FCC jurisdiction and whether the published information is subject to the cable operator's "control." FCC cable regulations continue to distinguish between "origination cablecasting," over which the cable operator has "exclusive control," and programming controlled by others. "Origination cablecasting" is subject to the fairness doctrine,[95] the personal attack corollary,[96] and the FCC's political broadcasting rules;[97] "programming" is not. Also, origination channels may not carry obscene or indecent matter, advertising that lacks sponsorship identification or lottery announcements.[98]

"Access channels" used by public groups,[99] are not subject to the content rules governing "origination cablecasting." State and local obscenity, defamation and possibly privacy statutes would, however, apply.

It seems clear that first amendment doctrines developed before the current information-processing and communications revolutions may be inadequate to deal with the issues of access and control which are certain to emerge as the uses of these new technologies proliferate. Careful consideration of these problems, and an attempt to anticipate them by legislation and regulatory clarification is necessary.

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94. *See supra* note 68 and accompanying text.

95. *See supra* note 19 and accompanying text.

96. *See supra* note 19 and accompanying text.

97. *See supra* notes 65-66 and accompanying text.

98. *See supra* notes 65-66 and accompanying text.

99. FCC rules requiring cable systems to set aside channels for access by the public, local officials and other leased-access users have been overturned as not "reasonably ancillary" to the Commission's authority over broadcasting. Midwest Video Corp. v. FCC, 440 U.S. 689 (1979). Access channels which cable systems make available voluntarily, however, are not subject to the FCC's program content rules.